

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JIM BASS HOLDEN,

Case No.: 2:14-cv-00894-APG-PAL

Petitioner

V.

ISIDRO BACA, et al.,

## **ORDER GRANTING, IN PART, THE RESPONDENTS' MOTION TO DISMISS**

## Respondents

[ECF No. 44]

The respondents move to dismiss petitioner Jim Bass Holden's third-amended petition.

ECF No. 44. I will grant that motion in part.

## **I. Brief Procedural History and Background**

On May 11, 2006, a jury convicted Holden of count 1: burglary while in possession of a firearm; count 2: conspiracy to commit murder; count 3: extortionate collection of debt; and count 4: first-degree murder with use of a deadly weapon. Exhibit 13.<sup>1</sup> The state district court sentenced Holden as follows: count 1 – 24 to 120 months; count 2 – 24 to 120 months, concurrent with count 1; count 3 – 21 to 48 months, concurrent with counts 1 and 2; count 4 – life without the possibility of parole plus an equal and consecutive term of life without the possibility of parole for use of the deadly weapon, concurrent with counts 1, 2, and 3 and consecutive to case nos. *See* Exh. 1 (C202943 and C214716). Judgment of conviction was entered on June 15, 2006. *Id.*

The Supreme Court of Nevada affirmed the convictions on October 17, 2007, and remittitur issued on November 13, 2007. Exhs 17, 69.

<sup>1</sup> Exhibits referenced in this order are found at ECF Nos. 16, 25, 37, 40-43, 45.

1 Holden filed a state postconviction habeas corpus petition, and the state district court  
2 appointed counsel. Exhs. 71, 73. The state district court conducted an evidentiary hearing and  
3 subsequently denied the petition. Exhs. 75-78. The Supreme Court of Nevada affirmed the  
4 denial on May 13, 2014, and remittitur issued on June 24, 2014. Exhs. 23, 85. Holden filed a  
5 second state postconviction petition, which the Supreme Court of Nevada denied on June 10,  
6 2015. *See* Case No. 65331. Remittitur issued on July 6, 2015. *Id.*

7 Holden dispatched his federal habeas petition for filing on May 27, 2014. ECF No. 7. I  
8 appointed counsel, and Holden filed a counseled, first-amended petition. ECF No. 16. On April  
9 13, 2015, I granted Holden's motion for a stay pending final resolution of his state-court  
10 proceedings. ECF No. 17. On February 3, 2017, I granted Holden's motion to reopen the case.  
11 ECF No. 23. Ultimately, on May 14, 2018, Holden filed a third-amended petition. ECF No. 39.  
12 The respondents move to dismiss several claims in the third-amended petition as untimely,  
13 noncognizable, or unexhausted. ECF No. 44.

14 **II. Legal Standards and Analysis**

15 **a. Claims Cognizable in Federal Habeas Corpus**

16 A state prisoner is entitled to federal habeas relief only if he is being held in custody in  
17 violation of the constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). Unless  
18 an issue of federal constitutional or statutory law is implicated by the facts presented, the claim is  
19 not cognizable under federal habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

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1           **Grounds 16(C) and 17(C)**

2           Holden claims that his state postconviction counsel was ineffective for failing to raise  
3 claims related to the testimony of both coroner Alane Olson (Ground 16(C)) and State's witness  
4 inmate Steven Hall (Ground 17(C)). ECF No. 39, pp. 40-45.<sup>2</sup> There is no federal constitutional  
5 right to the effective assistance of counsel in state postconviction proceedings. *Pennsylvania v.*  
6 *Finley*, 481 U.S. 551, 556-57 (1987); *Smith v. Idaho*, 383 F.3d 934, 939 (9th Cir. 2004). The  
7 Supreme Court of the United States has established an equitable exception to the procedural  
8 default doctrine based upon ineffective assistance of postconviction counsel. *Martinez v. Ryan*,  
9 566 U.S. at 1, 14 (2012). However, there remains no freestanding constitutional right to  
10 effective assistance of counsel in postconviction proceedings. Accordingly, grounds 16(C) and  
11 17(C) – even assuming that the claims are timely—are dismissed as noncognizable in federal  
12 habeas corpus.

13           **b. Relation Back**

14           The respondents argue that several grounds in Holden's third-amended petition do not  
15 relate back to a timely filed petition and should thus be dismissed as untimely. ECF No. 44, pp.  
16 14-16. The Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on April  
17 24, 1996 and imposes a one-year limitation period on the filing of federal habeas corpus  
18 petitions. 28 U.S.C. § 2244(d). The one-year time limitation can run from the date on which a  
19 petitioner's judgment became final by conclusion of direct review, or the expiration of the time  
20 for seeking direct review. 28 U.S.C. § 2244(d)(1)(A). Further, a properly filed petition for state  
21 postconviction relief can toll the limitation period. 28 U.S.C. § 2244(d)(2).

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<sup>2</sup> The respondents separated grounds 16 and 17 into subparts; the court follows their delineation.

1 A new claim in an amended petition that is filed after the expiration of the AEDPA one-  
2 year limitation period will be timely only if the new claim relates back to a claim in a timely  
3 filed pleading under Rule 15(c) of the Federal Rules of Civil Procedure. The claim must arise  
4 out of “the same conduct, transaction or occurrence” as a claim in the timely pleading. *Mayle v.*  
5 *Felix*, 545 U.S. 644 (2005). In *Mayle*, the Supreme Court held that habeas claims in an amended  
6 petition do not arise out of “the same conduct, transaction or occurrence” as claims in the  
7 original petition merely because the claims challenge the same trial, conviction, or sentence. *Id.*  
8 at 655-64. Rather, under the construction of the rule approved in *Mayle*, Rule 15(c) permits  
9 relation back of habeas claims asserted in an amended petition “only when the claims added by  
10 amendment arise from the same core facts as the timely filed claims, and not when the new  
11 claims depend upon events separate in ‘both time and type’ from the originally raised episodes.”  
12 *Id.* at 657. In this regard, the reviewing court looks to “the existence of a common ‘core of  
13 operative facts’ uniting the original and newly asserted claims.” A claim that merely adds “a  
14 new legal theory tied to the same operative facts as those initially alleged” will relate back and  
15 be timely. *Id.* at 658 n.5; *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1297 (9th Cir. 2013).

16 Here, the Supreme Court of Nevada affirmed Holden’s convictions on October 17, 2007.  
17 Exh. 17. Holden did not seek a writ of certiorari, and therefore his conviction became final 90  
18 days later, on January 15, 2008. *Jimenez v. Quarterman*, 555 U.S. 113, 119-20 (2009)  
19 (conviction final when Supreme Court denies petition for writ of certiorari, or when time to seek  
20 writ expires); *see also* Sup. Ct. R. 13(1). Holden filed his initial state habeas petition 221 days  
21 later, on August 23, 2008. Exhs. 18-1 through 18-4. The limitation period resumed running on  
22 June 11, 2014, when the Supreme Court of Nevada issued the remittitur after affirming the denial  
23 of Holden’s state habeas corpus petition. ECF No. 25-54. When Holden filed his first-amended

1 federal habeas petition, on October 29, 2014 (ECF No. 16), four days remained of the limitation  
2 period. The limitation period expired on November 2, 2014. Accordingly, the third-amended  
3 petition, filed on May 14, 2018, is untimely unless the claims asserted in it relate back to  
4 Holden's original, pro se petition or first-amended petition. The respondents argue that grounds  
5 15 through 18 are untimely. ECF No. 44, pp. 14-16.

6 **Ground 15**

7 Holden asserts that his counsel was ineffective for failing to fully communicate a plea  
8 offer to him. ECF No. 39, p. 39. In his pro se petition, Holden answered question 7 – whether he  
9 had any matters pending in any court challenging the same judgment of conviction – by stating  
10 “N.V. Supreme Court separate appeal on trial attorney failing to advise me of plea negotiations.”  
11 ECF No. 7, p. 2. Holden set forth 12 grounds in the proper section of the form alleging that his  
12 conviction violated his federal constitutional rights. He did not include a ground asserting that  
13 trial counsel was ineffective for failing to fully communicate a plea offer. His answer to  
14 question 7 is not sufficient to set forth a ground for federal habeas relief. Ground 15 does not  
15 relate back to a timely-filed claim and therefore is dismissed.

16 **Ground 16(B)**

17 Holden argues that his counsel was ineffective for failing to object to the testimony of  
18 coroner Alane Olson, who was not the coroner who performed the autopsy of the victim. ECF  
19 No. 39, pp. 40-41. Holden raised claims in his original and first-amended petitions alleging that  
20 the trial court erred in allowing Olson's testimony without proper foundation, which violated his  
21 Fourteenth Amendment due process rights. ECF No. 7, p. 9; ECF No. 16, p. 15. However, a  
22 Sixth Amendment claim based on what trial counsel allegedly failed to do is different in type  
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1 from a claim based on alleged trial court error. *Schneider v. McDaniel*, 674 F.3d 1144, 1151 (9th  
2 Cir. 2012). Ground 16(B) does not relate back and is thus untimely.

3           **Ground 17(A) & (B)**

4           In ground 17(A) of the third-amended petition, Holden contends that state prosecutors  
5 violated his Sixth Amendment right to counsel through their use of inmate-informant Steven Hall  
6 as a witness, who they placed in Holden's cell after Hall offered to cooperate with the State.  
7 Hall encouraged Holden to write a journal; Holden left Hall the journal after Hall told Holden he  
8 would use it to help Holden. ECF No. 39, pp. 41-45. In ground 17(B), Holden asserts that trial  
9 counsel was ineffective for failing to raise this issue. *Id.*

10          In his original petition, Holden asserted that his trial counsel was ineffective for failing to  
11 challenge the State's use of the known informant who was placed in Holden's cell after he made  
12 a deal with the State and who had Holden write a journal. ECF No. 7, pp. 13, 19. Ground 17(B)  
13 relates back to this ineffective assistance of counsel claim that Holden raised in his original  
14 petition. However, Holden did not raise in a timely-filed petition the claim that the State violated  
15 his Sixth Amendment right to counsel by placing Hall in his cell after Hall made a deal with the  
16 State. Thus, ground 17(A) does not relate back and is untimely.

17           **c. Exhaustion**

18          A federal court will not grant a state prisoner's petition for habeas relief until the prisoner  
19 has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509  
20 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on  
21 each of his claims before he presents those claims in a federal habeas petition. *O'Sullivan v.*  
22 *Boerckel*, 526 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A  
23 claim remains unexhausted until the petitioner has given the highest available state court the

1 opportunity to consider the claim through direct appeal or state collateral review proceedings.  
2 See *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374,  
3 376 (9th Cir. 1981).

4 A habeas petitioner must “present the state courts with the same claim he urges upon the  
5 federal court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional  
6 implications of a claim, not just issues of state law, must have been raised in the state court to  
7 achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*,  
8 404 U.S. at 276)).

9 A claim is not exhausted unless the petitioner has presented to the state court the same  
10 operative facts and legal theory upon which his federal habeas claim is based. *Bland v.*  
11 *California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion  
12 requirement is not met when the petitioner presents to the federal court facts or evidence that  
13 place the claim in a significantly different posture than it was in the state courts, or where  
14 different facts are presented at the federal level to support the same theory. See *Nevius v.*  
15 *Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9th  
16 Cir. 1982).

17 **Ground 18**

18 Holden argues that the cumulative effect of constitutional errors violated his Fifth and  
19 Fourteenth Amendment due process rights. ECF No. 39, pp. 45-46. To the extent that this  
20 ground includes a claim of cumulative error due to ineffective assistance of trial and appellate  
21 counsel, it is duplicative of ground 14. *Id.* at 38-39. The parties do not dispute that Holden did  
22 not present to the highest state court the portion of ground 18 that claims cumulative error based  
23 on substantive error. *Id.* at 45-46; ECF No. 44, p. 17. The claim of cumulative error based on

1 substantive error in ground 18 is therefore unexhausted. *See Wooten v. Kirkland*, 540 F.3d 1019  
2 (9th Cir. 2008).

3 **III. Petitioner's Options Regarding Unexhausted Claim**

4 A federal court may not entertain a habeas petition unless the petitioner has exhausted  
5 available and adequate state court remedies with respect to all claims in the petition. *Rose v.*  
6 *Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both exhausted and  
7 unexhausted claims is subject to dismissal. *Id.* In the present case, grounds 16(C) and 17(C) are  
8 dismissed as noncognizable in federal habeas; grounds 15, 16(B), and 17(A) are dismissed as  
9 untimely; and ground 18 is unexhausted. Because the petition contains an unexhausted claim,  
10 Holden has these options:

11 1. He may submit a sworn declaration voluntarily abandoning the  
12 unexhausted claim in his federal habeas petition, and proceed only on the  
13 exhausted claims;

14 2. He may return to state court to exhaust his unexhausted claim, in  
15 which case his federal habeas petition will be denied without prejudice; or

16 3. He may file a motion asking this court to stay and abey his  
17 exhausted federal habeas claims while he returns to state court to exhaust his  
18 unexhausted claim.<sup>3</sup>

19 With respect to the third option, I have discretion whether to grant or deny a request to  
20 stay a petition that I may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276  
21 (2005).

22 [S]tay and abeyance should be available only in limited circumstances.  
23 Because granting a stay effectively excuses a petitioner’s failure to present his  
claims first to the state courts, stay and abeyance is only appropriate when the  
district court determines there was good cause for the petitioner’s failure to

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<sup>3</sup> In his opposition to the motion to dismiss, Holden asks that if I conclude that any claims are unexhausted, he be given leave to delete those unexhausted claims. ECF No. 48, p. 22. Out of an abundance of caution, I have set out Holden’s options regarding unexhausted claims. If Holden intends to abandon ground 18, he must file a declaration voluntarily abandoning it.

1 exhaust his claims first in state court. Moreover, even if a petitioner had good  
2 cause for that failure, the district court would abuse its discretion if it were to  
3 grant him a stay when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C.  
4 § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the  
merits, notwithstanding the failure of the applicant to exhaust the remedies  
available in the courts of the State”).

5 544 U.S. at 277.

6 If Holden wishes to ask for a stay, he must file a motion for stay and abeyance. That  
7 motion must demonstrate both good cause for Holden’s failure to exhaust his unexhausted claim  
8 in state court and that the unexhausted claim is not plainly meritless. The respondents would  
9 then be granted an opportunity to respond, and Holden could file a reply. Or, Holden may file a  
10 declaration voluntarily abandoning his unexhausted claim, as described above.

11 If Holden fails to choose any of the three options listed above, or to seek other  
12 appropriate relief from this court, his federal habeas petition will be dismissed. Holden is  
13 advised to familiarize himself with the limitation periods for filing federal habeas petitions  
14 contained in 28 U.S.C. § 2244(d), as those limitation periods may have a direct and substantial  
15 effect on the choice he makes regarding his petition.

16 **IV. Conclusion**

17 IT IS THEREFORE ORDERED that the respondents’ motion to dismiss (**ECF No. 44**) is  
18 **GRANTED** as follows:

19 Grounds 15, 16(B), 16(C), 17(A), and 17(C) are DISMISSED as set forth in this order.

20 Ground 18 is UNEXHAUSTED.

21 IT IS FURTHER ORDERED that **Holden shall have 30 days to either:** (1) inform this  
22 court in a sworn declaration that he wishes to formally and forever abandon the unexhausted  
23 ground for relief in his federal habeas petition and proceed on the exhausted grounds; **OR**

1 (2) inform this court in a sworn declaration that he wishes to dismiss this petition without  
2 prejudice in order to return to state court to exhaust his unexhausted claim; **OR** (3) file a motion  
3 for a stay and abeyance, asking this court to hold his exhausted claims in abeyance while he  
4 returns to state court to exhaust his unexhausted claim. If Holden chooses to file a motion for a  
5 stay and abeyance, or seek other appropriate relief, the respondents may respond to that as  
6 provided in Local Rule 7-2.

7       IT IS FURTHER ORDERED that if Holden elects to abandon his unexhausted ground,  
8 the respondents will have 30 days from the date Holden serves his declaration of abandonment in  
9 which to file an answer to the remaining grounds for relief. The answer shall contain all  
10 substantive and procedural arguments as to all surviving grounds of the petition and shall comply  
11 with Rule 5 of the Rules Governing Proceedings in the United States District Courts under 28  
12 U.S.C. §2254. Holden will have 30 days following service of the respondents' answer in which  
13 to file a reply.

14       IT IS FURTHER ORDERED that if Holden fails to respond to this order within the time  
15 permitted, as described above, this case may be dismissed.

16                   Dated: March 7, 2019

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Andrew P. Gordon  
United States District Judge

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